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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues	CS Docket No. 99-363

To: The Commission

REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its reply comments in this important proceeding to implement the bad faith and exclusive dealing prohibitions that the Commission must impose on broadcasters negotiating local-into-local retransmission consent with satellite carriers under the Satellite Home Viewer Improvement Act of 1999.[1]

[1] Act of Nov. 29, 1999, PL 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), codified in scattered sections of 17 and 47 U.S.C.

I. SECTION 325(B)'S GOOD FAITH REQUIREMENT MUST BE AGGRESSIVELY IMPLEMENTED BY CONCRETE RULES

Section 325(b)'s good faith requirement must be aggressively implemented by objectively and specifically defining "good faith." The need for concrete rules is especially acute because some of the comments made by broadcasters in this proceeding indicate a disconcerting inclination to act with complete disregard for the congressional good faith mandate if left unguided by the Commission. Specifically, some broadcasters appear to take the defiant position that the statutory requirement of good faith dealing effectively amounts to nothing. They argue that the requirement is in fact not a requirement at all, but rather a "largely hortatory" provision, because the term good faith is too "amorphous" and "nebulous" to define, and the statute does not provide the FCC with sufficient guidance to establish objective, specific criteria.[2] In fact, there is no mistaking Congress's intent for a mere hortatory admonition – under the statute, the Commission "shall" "prohibit" bad faith negotiation. The broadcasters' view that implementation of that provision would be hard work is a pathetically flimsy basis for their suggestion that the Commission abdicate its statutory duty. Nor is that task nearly as Herculean as the broadcasters suggest. Congress has provided valuable assistance by directing the Commission to implement Section 325(b)'s "good faith" requirement in a manner consistent with competitive marketplace considerations.

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[2] Comments of NAB, 6-8; Comments of The Walt Disney Company ("Disney"), 1-8; Joint Comments of the ABC, CBS, FOX, and NBC Television Network Affiliate Association ("Joint Comments ABC, et al."), 4-6.

A. The Commission May Not Abstain from Implementing the Bad Faith Prohibition Because of a View That Implementation is Difficult

On reading the congressional language, no good faith observer would contend that the good faith provision is a mere advisory:

> The Commission ***shall*** . . . ***prohibit*** a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith . . .[3]

"Shall" and "prohibit" are never used by Congress to impart advice – indeed, there is no more explicit way for Congress to enact a mandatory prohibition than by using these words. In the face of this language, however, the NAB unflinchingly describes the provision as "largely hortatory,"[4] suggesting an inclination on the part of the broadcasters to flout what they view as mere exhortation, unless the Commission gives them guidance by enacting concrete rules.

The broadcasters urge the Commission to simply "stand back," "allow the marketplace to work freely,"[5] and refrain from promulgating such rules, because Section 325(b)'s good faith requirement is simply too nebulous to effectively implement.[6] According to the NAB, "the extraordinary – indeed, usually insuperable – difficulty of implementing an obligation to negotiate in good faith" is reason enough for the Commission to do nothing.[7] For

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3 SHVIA, § 1002 (to be codified at 47 U.S.C. § 325(b)) (emphasis supplied).

4 NAB Comments at 16.

5 Joint Comments of ABC, et al., 16.

6 Comments of NAB, 6-8.

7 Comments of NAB, 6.

its part, Disney argues that Congress "deliberately imposed no requirements relating to the terms of the deals themselves."[8] Therefore, these commenters argue, the Commission should refrain from attempting to substantively implement Section 325(b)'s good faith requirement. Otherwise, each retransmission consent negotiation could easily become the subject of costly, complex litigation.

The amorphous nature of the term "good faith" in the abstract is simply not a reason for the Commission to take a hands-off approach. To the contrary, it is precisely the reason why the Commission must add specificity to the requirement, using the two-tiered approach proposed in the NPRM. It is only such specificity, tailored to meet the particular characteristics of the retransmission consent marketplace, that can provide parties with the certainty that alone would obviate the need for countless complaint proceedings.

Nor is the fact that Congress did not establish a highly detailed approach to regulating retransmission consent in the statute itself tantamount to a congressional decision that a detailed approach is unnecessary – much less unauthorized.[9] Rather, it indicates a Congressional decision to defer to the expertise of the Commission. Far from being unusual, such deference is the typical way in which Congress and administrative agencies work together to enact and implement laws.

The three good faith rules that the NAB does come up with are so woefully insufficient that they suggest an attempt by the NAB to "bracket" the issue by staking out an extreme position in hopes that the Commission will be lured into striking some "middle" ground

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8 Comments of Disney, 1.

9 Comments of NAB, 16.

that will itself be woefully insufficient. No bad faith actor would be so inept or so artless as to display its bad faith by not agreeing to a convenient time and place to meet, not appointing a representative to negotiate, and not committing to writing a retransmission agreement once a deal has been reached.[10] The respective "prohibitions" suggested by the broadcasters are a travesty, and do not provide the Commission with any real help in implementing the bad faith prohibition.

B. The Commission Can and Must Follow Congressional Guidelines in Implementing Section 325(b)

Nor is the task of implementing this particular good faith requirement nearly as difficult as the broadcasters suggest. While good faith may be amorphous in the abstract, courts discussing good faith have consistently held what should be obvious – a good faith obligation takes its contours from the document establishing it, whether it be a contract or (as here) the authoritative word of Congress.[11] In that respect, Section 325(b) already gives significant definition to this particular good faith obligation by stating that differences in terms are not a

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10 Comments of NAB, 21; Comments of Disney, 7; Joint Comments of ABC, et al., 15.

11 *See A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc.*, 873 F.2d 155, 158 (7th Cir. 1989) ("The full extent of a party's duty to negotiate in good faith can only be determined, however, from the terms of the letter of intent itself."); *Milex Products, Inc. v. ALRA Laboratories, Inc.*, 603 N.E. 2d 1226, 1234 (Ill. App. Ct. 1992); *Channel Home Centers v. Grossman*, 795 F.2d 291, 291 (3d Cir. 1986) (holding that an agreement to negotiate in good faith binds the parties to the terms of the agreement, provided the terms are "sufficiently definite to be enforced"); *Chase v. Consolidated Foods Corp.*, 744 F.2d 566, 571 (7th Cir. 1984) (finding that an agreement to negotiate in good faith constitutes a binding, enforceable contract if that is what the parties intended); *Itek Corp. v. Chicago Aerial Industries, Inc.*, 248 A.2d 625, 629 (Del. 1968) (holding that parties who intentionally obligated themselves to "make every reasonable effort to agree upon a formal contract" were bound to "attempt in good faith to reach final and formal agreement" and could not sever negotiations simply to obtain a better deal from a third party).

violation of the good faith requirement so long as they are based on competitive marketplace considerations – a qualification that makes Section 325(b)'s good faith requirement significantly more specific than most agreements to negotiate in good faith. This is precisely the type of guidance in the Commission's effort to give concrete content to the provision that the NAB and others asserts is lacking from the statute. It is thus incumbent on the Commission to specifically define good faith and to do so by determining what is – and what is not – a competitive marketplace consideration.

As with "good faith," the broadcasters try to write the "competitive marketplace considerations" criterion out of the statute, by essentially pressing on the Commission the rule "if we demand it, then it must be based on competitive marketplace considerations." This rule rests on the NAB's worthless assurance that broadcasters have an incentive to give retransmission consent – *ergo*, according to the NAB, the broadcasters' desire to reach a deal will ensure sufficient self-discipline on their demands and prevent these demands from becoming overreaching, creating a marketplace-driven self-policing mechanism that obviates any oversight by the Commission. Underlying that line of argument are the broadcasters' assertions that trusting the marketplace was the congressional intent, and that the marketplace is competitive.

The NAB supports its view of the Congressional intent by argument based on free-association and wordplay: because Congress used the phrase "competitive *marketplace* considerations" to define which disparities in terms of retransmission would be legitimate, it follows that Congress intended the Commission to leave policing of the bad faith prohibition to the marketplace. According to the broadcasters, Congress' express "desire for a competitive marketplace counsels in favor of only limited regulatory interference with free market negotiations."[12]

Conveniently, the NAB equates "free market" with "competitive market." However, as both Congress and the Commission know, the two terms are not always equivalent. If Congress believed that the workings of the marketplace would automatically guarantee competitive marketplace considerations without need for regulatory intervention, it would not have needed to enact a compulsory copyright license, it would not have imposed a good faith requirement on retransmission negotiations, and it would certainly not have needed to lay down a "competitive marketplace considerations" criterion. A congressional "desire" to allow disparities in the terms of retransmission based on competitive marketplace considerations does not amount to a belief that a competitive marketplace exists, but rather sets the standard for determining which term disparities are legitimate and which are not. In establishing that standard, Congress made it the Commission's express responsibility to clearly delineate rules to ensure that a "free market" retransmission consent negotiation is, in fact, competitive, and not anti-competitive in nature.

The NAB next tries to prove that the retransmission marketplace is competitive in a curious and ultimately illogical fashion: it tries to rely on the "existence of multiple buyers."[13] Of course, the existence of many buyers and only one or a few sellers is the hallmark of a monopoly or oligopoly respectively. There are only 4 established sources of broadcast network

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12 Comments of NAB, 17.

13 *See* NAB Comments at 18 ("the existence of multiple buyers is obviously a very important 'competitive marketplace consideration.'").

programming in the nation, and indeed the struggle of companies as strong as Time Warner and Paramount to establish a fifth and sixth network demonstrates the huge barriers to entry in this particular marketplace. On the buyer side, the higher the number of buyers, the greater the market power of the sellers and the more formidable their ability to whipsaw buyers against one another. It is therefore mind-boggling that the NAB would rely on the multiplicity of buyers in support of its assertion that the marketplace is competitive.

The NAB goes on to argue that the marketplace has become more competitive because the dominance of cable operators has been undermined by competition from satellite carriers.[14] By the same token, however, even if this were true (the Commission found only a few days ago that the cable operators' dominance persists),[15] it would only <u>increase</u> the networks' ability to play off one MVPD distributor against another in retransmission negotiations. It is this ability that Congress sought to restrain by imposing a good faith requirement on the broadcast stations (and by strictly prohibiting exclusivity agreements). EchoStar cannot comprehend how such a further increase in the seller's power could suggest a more competitive marketplace and support the broadcasters' request that the Commission leave it to the market to sort retransmission deals out.

In fact, of course, far from being competitive, the retransmission marketplace is distorted by several anti-competitive considerations relating to the market (oligopoly) power of the broadcast networks and the market (oligopsony) power of the cable operators against which

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14 Comments of NAB, 17-19.

15 *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, CS Docket No. 99-230, ¶ 4 (rel. Jan. 14, 2000).

satellite carriers have to compete. The marketplace is rife with the possibility for anti-competitive conduct.

Regrettably, proof that the broadcasters' conduct may well be based on anti-competitive considerations is conspicuously present in the broadcasters' pleadings themselves. As will be discussed in greater detail below, the broadcasters are trying to reserve the ability to deny EchoStar their local-into-local retransmission consent based on their distant signal dispute with EchoStar pending in federal court in Miami. That denial is not based on competitive marketplace considerations because, if anything, local-in-local retransmission may reduce consumer interest in distant signals and correspondingly also lessen broadcasters' distant signal-related concerns. While this attempt should be nipped in the bud by the Commission, it also shows that this is not an area where the Commission can appropriately rely on any "good-Samaritan" incentives of the regulated entity. The broadcasters' inclinations point to the need to carefully define what does and does not constitute competitive marketplace considerations and vigilantly police broadcasters' conduct.

To that end, the Commission should adopt a standard including (1) a test based on a list of *per se* violations of good faith; and (2) a test based on a case-by-case evaluation of specific circumstances, aided by (3) presumptions based on actual marketplace experience and guiding the determination of what does, and does not, constitute "competitive marketplace considerations."

1. The Commission Must Specifically and Substantively Define What Does and What Does Not Constitute Competitive Marketplace Considerations

The experiences of the retransmission negotiations and deals with cable operators offer significant guidance in achieving this. These deals are probative of what would happen in a more competitive marketplace exactly because of the market power enjoyed by cable operators, which tends to balance out the power of the networks, replicating more closely a competitive marketplace composed of buyers and sellers of roughly equal power than in the case of negotiations between the networks and EchoStar. Moreover, these deals form an unmistakable norm – the cable operators have received retransmission in exchange for very little consideration and without having to make any cash payment even in a single reported case. This consistent pattern transcends isolated deals. Thus, while disparities between a broadcaster demand and one particular deal might or might not be dispositive of whether the difference is due to competitive marketplace considerations, demand for terms that are more onerous than the norm should create a strong presumption to that effect. That presumption is also consistent with the Copyright Office's recent and authoritative determination, based on reams of evidence, that the value of local-into-local retransmissions is zero, in light of the two-way benefits flowing from retransmission and the fact that local consumers are already counted for the purpose of determining a broadcast station's reach and the audience it can deliver to advertisers.[16] In its Comments, EchoStar has also suggested a balanced and equitable method for rebutting that

[16] *In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Report of the Copyright Arbitration Royalty Panel, 51-52 ("CARP Report"), adopted by the Copyright Royalty Tribunal, 47 FR 19052 (1992), affirmed by the Register of Copyrights, Copyright Office, 62 FR 55742 (1997) ("*Final Order*").

presumption – based on the competitive justifications that the Commission allows cable-affiliated programmers to prove in the program access area, with some necessary adjustments.

On the other hand, instances of bad faith may also be found in demands for consideration that a network may have extracted from cable operators. This is because, in a competitive marketplace, broadcasters should on balance be willing to grant their retransmission consent to satellite distributors on better terms than those enjoyed by cable operators. Several factors point to that conclusion: ***first***, in a retransmission deal with a cable operator, the broadcaster's retransmission consent makes a cable system more attractive to local advertisers, which may now view cable as a more acceptable advertising outlet, resulting in potential loss of local advertising revenue for the local broadcast station. Diversion of local advertising revenue is not a risk involved in the broadcaster's granting retransmission consent to a satellite carrier.

Second, the grant of retransmission consent to a cable operator may induce many viewers that previously did not subscribe to any MVPD offering to buy cable and thus move from an environment of limited programming options (the broadcast stations) to one of many more options, resulting in a rating loss for the broadcaster. In the case of satellite retransmission on the other hand, any such risk would be much more limited: the vast majority of consumers that would become satellite subscribers because of the addition of local signals are expected to be cable subscribers moving to satellite from cable – *i.e.*, to one MVPD offering from another, and therefore not experiencing an increase in their viewing options from only broadcast to MVPD.

Third, the cost that needs to be incurred by the satellite operator to retransmit local signals is much greater than the cost incurred by a cable operator. To retransmit one local station to one market, EchoStar must dedicate one channel of nationwide satellite capacity. The satellite carrier's capacity expenditure is therefore many times that of the cable operator – it is as if AT&T, to take an example of a Multiple System Operator, had to vacate one channel of programming on all its systems nationwide in order to be able to retransmit the NBC Washington, D.C. affiliate in Washington, D.C. This higher cost suggests a different balance of costs and benefits and would point to a lower consideration for satellite retransmission in a truly competitive marketplace. That last factor is particularly significant: concessions such as the carriage of digital broadcast signals, which are almost costless for a cable operator, are so prohibitively costly as to be virtually impossible to accede to for a satellite carrier.

2. The Commission Must Not Accept Anti-Competitive Demands as Routine Bargaining Methods

In their Comments, the broadcast interests put the Commission on notice that they will try to extract excessive consideration and impose unreasonable tying demands on satellite carriers seeking retransmission consent – terms precisely of the type that in EchoStar's view should be prohibited either outright or presumptively, depending on the types of demand.

In support of the broadcasters' position, the NAB points to the fees charged by EchoStar and DIRECTV for local signals to indicate that such stations have significant value for satellite carriers and thus broadcasters should be free to demand that they receive a portion of that value as consideration and be free to withhold consent if they cannot obtain the deals they desire.[17] Such an argument, however, ignores the reality of the retransmission marketplace in several significant respects. ***First***, EchoStar and DIRECTV charge their local signal subscribers

[17] Comments of NAB, 14.

for value that they create, not value created by the broadcasters. Most of the consumers subscribing to local signals are generally presumed under existing Grade B standards to already receive these signals off the air. Thus, the only reason why these consumers purchase a satellite carrier's local signal offering is for value that the satellite carrier provides, including increased quality, convenience, and aesthetics (*i.e.*, lack of off-air antenna). There is absolutely no reason that television broadcast stations should expect to share in the revenues that are solely attributable to the value added to a television broadcast signal by a satellite carrier.

Second, consumers within a local DMA are already counted for purposes of determining the audience that a local broadcaster can deliver to advertisers and the compensation to be received by the broadcaster – one of the reasons why the Copyright Office has concluded that the market value of local-into-local retransmissions is zero. In other words, broadcasters have already been fully compensated, through advertising revenue, for the retransmitted signal. Any additional compensation would thus exceed the competitive market value of the programming.

Third, the cable systems' charges for "lifeline" cable (essentially the broadcast channels) are higher ($10 dollars or more), even as cable operators throughout the country have received retransmission consent for no cash payment and at very little cost.[18]

The NAB also points to statements by satellite carriers that local broadcast signals are essential to their competitiveness as an excuse to demand more compensation for their retransmission consent.[19] However, as EchoStar has already pointed out in its comments,

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18 EchoStar notes that District Cablevision's charges $11.72 per month for its basic service.

19 Comments of NAB, 12-13.

> the Commission should not confuse the market value of network retransmissions with the crucial importance of local network signals to satellite carriers. These signals are important because they are controlled by the networks and because they have so far been generally unavailable to satellite carriers, while their cable competitors have offered them having secured them at little or no cost. The resulting acute need of satellite distributors for those signals is consistent with the close to zero market value of a marginal unit of retransmission. By the same token, the fundamental importance of water (or indeed air) to life does not support a high market value, which in a competitive market is based on the cost of the last drop.[20]

In short, the Commission must stringently examine any broadcaster demands for compensation, and should permit such demands only if they are economically justified. In this regard, the Commission should look to the exceptions to the discrimination prohibitions of the program access rules. These exceptions specifically delineate those marketplace considerations that support differential terms and conditions for carriage in the program access context: (1) reasonable financial requirements; (2) actual and reasonable differences in costs; and (3) economies of scale.[21] At the same time, the Commission should adapt these exceptions with caution as opposed to adopting them wholesale. The implementation of the program access rules has been blunted by the very lack of enforcement teeth that, if tolerated here, would doom SHVIA to failure. One reason for the lax enforcement is the broad exceptions to the anti-discrimination rules. At a minimum the Commission should re-confirm and vigorously apply safeguards such as placing the burden of proof for such justifications squarely on the broadcasters, especially since there generally do not appear to be cost differences or economies of scale justifying different terms for satellite versus cable retransmissions.

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20 Comments of EchoStar, 15.

21 47 C.F.R. § 76.1002(b)(1)-(3).

The Commission should also allow discovery as of right. The questions of disparity in terms and the presence or lack of competitive marketplace considerations are intensely factual. A practice of rarely permitting discovery, as in the program access area, might encourage broadcasters to discriminate with impunity and to disguise that behavior behind vague invocations of competitive marketplace considerations, without sufficient opportunity to test these assertions through the fact-finding process.

Demand for Tying Arrangements. The Commission should prohibit outright tying arrangements that require the carriage of other broadcast stations in the same or other local markets or the carriage of digital signals.[22] MVPD distributors, cable and satellite alike, agree that such tying arrangements cannot be economically justified and thus must be considered *per se* violations of Section 325(b)'s good faith requirement.[23]

The proposal to permit broadcasters to demand the carriage of other broadcast signals (including digital signals) in exchange for their retransmission consent would further augment the already excessive must-carry requirements of the SHVIA, and is particularly oppressive. As EchoStar explained in its Comments, the must-carry obligations do not extend to a local market that the satellite carrier has not decided to serve, and do not set in before 2002. Such carriage requirements would therefore be an attempt to exceed and rewrite those statutory obligations. As the American Cable Association correctly puts it, "tying digital broadcast carriage to analog retransmission consent is the broadcasting industry's jerry-rigged way to

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22 Comments of NAB, 25-28; Joint Comments of ABC, et al., 21.

23 Comments of EchoStar, 13; Comments of DIRECTV, 10; Comments of BellSouth Corporation, BellSouth Interactive Media Services, Inc., and BellSouth Wireless Cable, Inc. ("BellSouth"), 20; Comments of U S WEST, Inc. ("U S WEST"), 5-6.

achieve digital must-carry."[24] Additionally, by agreeing to carry the digital signals of a network's stations, a cable operator would be merely agreeing to add one channel to each of its systems. For a satellite carrier, on the other hand, the spectrum expenditure would be much more severe: each additional signal would require the dedication of cumulative nationwide capacity on EchoStar's nationwide system (thus, an additional channel for each of 10 cities would require 10 dedicated channels nationwide). While such a requirement might be acceptable to a cable system, it would be impossible to meet for a satellite operator. Accordingly, "the FCC can and should declare that any attempt by a broadcaster to impose non-optional tying arrangements on a competing MVPD in exchange for retransmission consent will be deemed a per se violation of the "good faith" requirement and shall be actionable as such."[25]

II. THE COMMISSION MUST NOT COUNTENANCE REFUSALS TO DEAL UNDER ANY PRETEXT

The most disconcerting sign of an inclination on the part of the broadcasters to disregard the good faith mandate if left unguided by the Commission is found in the NAB's effort to stake out the broadcasters' ability to deny EchoStar *local-into-local* retransmission consent on the ground that EchoStar and the broadcasters are currently involved in copyright litigation over the retransmission of *distant* signals. In particular, the NAB alleges (without of course offering any proof) that "EchoStar is today violating the rights of hundreds of local broadcast stations by illegally delivering distant network signals to thousands of ineligible

[24] Comments of American Cable Association, 8-9

[25] Comments of U S WEST, 5-6. *See also* Comments of BellSouth at 13-18.

subscribers in many markets,[26] and continues" that "[i]t is natural for a company whose rights are being violated to ask that the violations stop before it will enter into a new transaction with the transgressor."[27] EchoStar has refuted, and will continue to refute, these incendiary allegations in the federal district court in Florida, and will not dignify them by rebutting them in this forum where they do not belong. The broadcasters should not be allowed to use the distant signals litigation as a pretext for denying EchoStar retransmission consent. The Commission should leave no doubt at all that such behavior would be a blatant refusal to deal that trumps the congressional directive and violates the core of the prohibitions on bad faith and exclusive dealing.

Such a denial of consent is not consistent with good faith negotiations for several reasons: ***first***, it ties the question of local-into-local retransmission to distant signal retransmissions in a way not intended by Congress. Congress – which was fully aware of the litigation between EchoStar and the broadcasters pending in Miami – has prescribed carefully defined forms of redress of retransmissions that violate the "unserved household" limitation in Section 119's distant signal license. Self-help by the broadcasters through a denial of local-into-local retransmission consent is not one of these types of redress. The broadcasters should not be allowed to take the law in their hands and, in the process, negate the congressional intent to at last allow local-into-local retransmissions. NAB is essentially asking the Commission to give broadcasters anti-competitive leverage of satellite carriers. By manufacturing a dispute, a broadcaster could essentially refuse to deal with any given carrier.

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26 Comments of NAB, 23.

27 *Id.*

Second, courts have frequently found instances of bad faith in similarly ill-suited behavior. For instance, in the employment area, the courts have recognized that "[w]hen an employer chooses one opening position and thereafter refuses to bargain, **or creates non-issues simply for the purpose of forestalling agreement[,]**" the employer is guilty of bad faith bargaining.[28]

Third, the Commission should perform its statutory duty as the courts perform their respective duties, and there is no basis in the statute allowing the Commission to stay its hand in carrying out its obligations. In that respect, the Cable Services Bureau's decision in *Speedvision* cited by the NAB analogous authority would in fact be inapposite in these proceedings even if it were correct.[29] That case would be more comparable if there were a retransmission consent agreement between a broadcaster and a satellite carrier, and the broadcaster had filed a breach of contract action alleging violations of that contract while the satellite carrier had filed a retransmission complaint with the FCC. Even if that were the case, the Commission should resist an attempt to stall its determinations by inventing a contractual

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[28] *N.L.R.B. v. Pratt & Whitney Air Craft Division, United Technologies Corp.*, 789 F.2d 121, 136 (2nd Cir. 1986) (emphasis added). *See also N.L.R.B. v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969) (employer found guilty of failure to negotiate in good faith and unfair labor practices where employer undertook a "take it or leave it" approach to union negotiations); *Milex Products, Inc. v. ALRA Laboratories, Inc.*, 603 N.E. 2d 1226, 1234 (Ill. App. Ct. 1992) ("[A] party might breach its obligation to bargain in good faith by unreasonably insisting on a condition . . . where such insistence is a thinly disguised pretext for scotching the deal . . ."); *General Athletic Products Co.*, Case 8-CA-9548, 227 NLRB 1565, 1574 (NLRB 1977) (noting that bad faith can be evidenced by "various acts and omissions . . . [which] demonstrate a basic disposition . . . to avoid [an] obligation to bargain with the aim of reaching an agreement").

[29] *See* NAB Comments at 24; *In the Matter of EchoStar Communications Corporation v. Speedvision Network, L.L.C.; Outdoor Life Network, L.L.C. Program Access Complaint*, 14 FCC Rcd. 9327 (1999).

dispute, and the Bureau's decision in *Speedvision* was fundamentally flawed in that respect. In any event, *Speedvision* presents fundamentally different circumstances (there is here no contract or contractual dispute), and the broadcasters cannot appropriately invoke it as a vehicle for using any federal court litigation to delay the Commission's adjudication of their conduct in the area of local-into-local retransmissions.

Fourth, there is no economic justification for the broadcasters to deny local-into-local retransmission based on their allegation that a satellite carrier has violated the limitations of the distant signal copyright license. If anything, local-into-local retransmissions lessen a consumer's interest in receiving distant network signals. Indeed, for years, the broadcasters have been arguing that, instead of revising the antiquated standard for defining which households are eligible to receive distant retransmission and increasing the number of eligible households, Congress should allow local-into-local retransmissions. In its pleadings in the Commission's Grade B rulemaking proceeding, the NAB trumpeted only a year ago its view that "local-to-local delivery of network stations, and effective use of over-the-air antennas, not an attack on localism, is the proper solution."[30] The NAB argued that:

> If Congress creates an appropriate statutory and regulatory regime, satellite companies will be able to compete with cable systems by offering <u>local</u> broadcast stations – not distant ones – to local viewers, just as cable systems do . . . **The local-to-local solution,**

[30] *See In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity*, Reply Comments of the National Association of Broadcasters, CS Docket No. 98-201 (filed Dec. 21, 1998) at ii.

> **if properly implemented, is a win/win situation for satellite companies, broadcasters, and consumers.**[31]

With regard to EchoStar in particular, the NAB stated:

> Prospects for a successful local-to-local solution have also been brightened by EchoStar's recent announcement that it is acquiring a vast amount of new satellite capacity. With hundreds of new channels at its disposal, EchoStar could offer local-to-local service to a large percentage of American television households.[32]

Thus, for broadcasters to now deny their consent to local-into-local retransmissions based on their purported concerns with distant retransmissions would turn that prior position on its head and would be an example of disparity in treatment that is not based on competitive marketplace considerations.[33]

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31 *In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity*, Comments of the National Association of Broadcasters, CS Docket No. 98-201 (filed Dec. 11, 1998) at 51 (emphasis added); *see also In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act; Part 73 Definition and Measurement of Signals of Grade B Intensity*, Reply Comments of the National Association of Broadcasters, CS Docket No. 98-201 (filed Dec. 21, 1998) at 53, 55-56 (the Commission's Report on Competition in Video Markets "confirms that local-to-local satellite delivery, along with more aggressive use of existing and improved over-the-air antenna technology, will largely solve whatever remaining problems may exist relating to delivery of network programming to dish owners . . . . the Commission should recommend that Congress act quickly to approve an appropriate statutory and regulatory regime for local-to-local delivery of broadcast stations by satellite companies.").

32 Comments of the National Association of Broadcasters (filed Dec. 11, 1998) at 51.

33 In light of the apparent effort of broadcasters to deny retransmission consent based on disputes with an MVPD, EchoStar also agrees with U S WEST's suggestion that "to ensure that competing MVPDs and their customers suffer no unwarranted disruptions of service pending resolution of retransmission consent disputes, the Commission should prohibit a broadcaster from withdrawing any existing retransmission consent given to an MVPD unless and until the MVPD's exclusivity/good faith complaint is denied by the Cable Services Bureau and, if reconsideration is requested, the full Commission." Comments of U S WEST, 8-9.

III. THE COMMISSION MUST PROHIBIT TELEVISION BROADCAST STATIONS FROM ENGAGING IN EXCLUSIVE DEALING, WHETHER *DE FACTO* OR *DE JURE*

As EchoStar argued in its comments, the prohibition on exclusive dealing should extend beyond *de jure* to *de facto* exclusivity, consistent with the broad statutory language ("engaging" rather than "entering") and with the fact that a narrow prohibition on *de jure* exclusivity would be easy to circumvent and ultimately meaningless. Contrary to the view expressed by the network affiliates,[34] a complainant should not be required to prove exclusivity by demonstrating the existence of an exclusivity provision in an existing agreement. It is absurd to suggest that exclusivity is only present and therefore deserving regulation if and when it is embodied in a document explicitly identifying it by name.

To avoid circumvention of its rules, the Commission must not hesitate to cast a wide net in determining which behavior is tantamount to *de facto* exclusive dealing. EchoStar agrees with the American Cable Association that *de facto* exclusivity agreements occur, for example, when broadcasters are allowed to impose unaffordable demands on smaller businesses,[35] or any business with which the broadcaster may have little or no interest in dealing. Broadcasters must not be rewarded for heightened levels of creativity and cleverness in circumventing the exclusivity prohibition with pricing schemes or incentives.

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34 Joint Comments of ABC, et al., 27.

35 Comments of American Cable Association at 14-15.

IV. THE ACT MUST NOT BE CONSTRUED TO DIVEST THE COMMISSION OF ITS JURISDICTION OVER EXCLUSIVE RETRANSMISSION CONSENT AGREEMENTS AFTER JANUARY 1, 2006

Section 325(b) of the Communications Act directs the Commission to initiate a rulemaking proceeding that will "until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts."[36] While this means that the Commission is under an explicit ***obligation*** to prohibit exclusivity ***until*** that date, nothing in the statute can be read to divest the Commission of its authority to continue to do so after that date. EchoStar agrees with the Wireless Communications Association International, Inc. ("WCA") that there is nothing in the legislative history of the SHVIA which suggests that Congress sought to repeal the Commission's authority to regulate such agreements.[37] Indeed, the Commission has had in place a prohibition on exclusive retransmission consent deals since before the enactment of the SHVIA and without need for a statutory provision required such a prohibition. *See* 47 C.F.R. § 76.64(m).

The Commission's authority over exclusive retransmission consent agreements beyond January 1, 2006 is vital to ensuring the promotion of competition with cable. In particular, Echostar concurs with BellSouth that, in the absence of Commission authority over these agreements, incumbent cable operators would "eviscerate competition by entering into exclusive retransmission consent agreements that deny their competitors full and fair access to

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[36] S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, Section 1009(a)(2)(C)(ii) at 46.

[37] Comments of WCA, 5-11.

broadcast programming."[38] Thus, as indicated by Local TV on Satellite, LLC, "[t]he Commission may and should extend the prohibition beyond the minimum period because the prohibition will continue to be necessary to foster competition and diversity in the MVPD market, which is precisely the intent of the 1999 SHVIA."[39]

V. THE COMMISSION MUST NOT ERECT PROCEDURAL BARRIERS TO RESOLUTION OF RETRANSMISSION CONSENT COMPLAINTS

The Commission must not erect barriers procedural to the resolution of retransmission consent complaints. Clearly, this is what broadcasters seek to do in this proceeding. In particular, NAB and others argues that the Commission should put the entire burden of proof on a complainant alleging a violation of Section 325(b).[40] Such an one-sided allocation of the burden of proof is entirely unreasonable, and, as with so many of the broadcasters' proposals in this proceeding, appears geared towards nullifying the effectiveness of Section 325(b)'s proscriptions. NAB's proposal to disallow damages is similarly eviscerating.[41]

In fact, many commenters, including EchoStar, agree with the Commission's proposal to require a shifting burden of proof, and urge the Commission to adopt rules which permit discovery of right as well as the liberal recovery of damages. ***First***, a shifting burden of

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38 Comments of BellSouth, 20; *see also* Comments of WCA, 5-11; Comments of LTVS, 8.

39 Comments of Local TV on Satellite, LLC at 8.

40 Comments of NAB, 30; Joint Comments of ABC et al., 28; Comments of Disney, 14-15.

41 Comments of NAB, 31.

proof is essential if the Commission is to effectively implement Section 325(b).[42] In particular, the Commission should make clear that a complaining party's *prima facie* showing will be made once it alleges a *per se* violation and supports this allegation by an affidavit. With respect to the factual questions of whether a broadcaster's demands are for different terms than those employed by other MVPDs and whether these differences are based on competitive marketplace considerations, the satellite carrier should be required to request all the necessary information from the broadcaster. As EchoStar argued in its comments, such a rule should parallel the Commission's current program access rules, which permit an aggrieved MVPD to request comparative rate information from a vendor. As under those rules, if the vendor does not provide the requested information, the MVPD may file a complaint based on information and belief, supported by an affidavit.[43] The Commission will then accept the complainant's rate allegations as true for purposes of a *prima facie* determination.[44] Similarly, since a broadcaster's attempted departure from the retransmission for carriage norm of the cable retransmission deals should be viewed as presumptively not based on competitive considerations, the satellite carrier's allegations, supported by an affidavit setting forth the carrier's information and belief, should be sufficient to establish the presumption. Consistent again with the program access rules, the burden should shift to the defendant broadcaster to prove one of the available competitive justifications.

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42 Comments of BellSouth, 25-26; Comments of WCA, 16-17; Comments of EchoStar, 21-23; Comments of DIRECTV, 18-19; Comments of U S WEST, 9.

43 *MVPD Order*, ¶ 126.

44 *Id.*

With respect to the appropriate remedies for violation of the bad faith prohibition, the NAB asserts that "[u]nder settled principles, the remedy for an alleged failure to bargain in good faith is simply a directive to engage in further bargaining."[45] Such a "remedy" is useless, as it would only allow further stalling and frustration of the congressional objective of bringing satellite local signals to consumers. Depending on the circumstances, the Commission should order the broadcaster that has been found to violate the bad faith prohibition to do more than just more bargaining – to reach an agreement that does not include any discriminatory terms not based on competitive marketplace considerations.

Furthermore, as the Commission has recognized in the program access area, it is appropriate to "compensat[e] . . . victims of clear-cut anti-competitive conduct which violates the program access rules. Restitution in the form of damages is an appropriate remedy to return improper gains obtained by vertically-integrated programmers to unjustly injured MVPDs."[46] Yet in establishing the availability of damages in the program access area, the Commission stated that damages would be appropriate in only limited circumstances. Specifically, the Commission stated that it would not impose damages where "a program access defendant relies upon a good faith interpretation of an ambiguous aspect of the program access provisions for which there is no guidance . . ."[47] The Commission also stated that "[w]here a violation is found,

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45 Comments of NAB, 31.

46 *In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd. 15822, ¶ 17 (1998).

47 *Id.*, ¶ 18.

the Cable Services Bureau ("Bureau") will indicate in its order whether the violation is the type for which the Commission will impose damages or forfeiture."[48]

Such limited damages are simply not a sufficient deterrent to violations of program access law – and will not be a sufficient deterrent to violations of retransmission consent law. Accordingly, the Commission should here ensure that its retransmission consent rules not only provide clear guidance in advance as to the nature and scope of a satellite broadcast station's obligations under Section 325(b), but also permit a satellite carrier to fully recover for each and every injury suffered at the hands of a television broadcast station that violates those obligations. Such a rule is both necessary to remedy the anti-competitive effect of any violation, but will also serve as a significant disincentive to violate the Commission's rules in the first place.

VI. CONCLUSION

For the foregoing reasons and those set forth in EchoStar's Comments, the Commission should promulgate concrete rules to implement the good faith and exclusive dealing provisions of the SHVIA.

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[48] *Id.*, ¶ 28.

Respectfully submitted,

EchoStar Satellite Corporation

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<u>**CERTIFICATE OF SERVICE**</u>

I, Colleen Sechrest, hereby declare that copies of the foregoing Reply Comments of EchoStar Satellite Corporation were sent this 21st day of January, 2000 by messenger to the following:

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Exhibit E

FCC000000436

EXHIBIT E

Federal Communications Commission Office of Plans and Policy, Working Paper No. 26: *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd. 3996 (rel. June 27, 1991), available on Westlaw (1991 WL 640551).

Citation Found Document Rank(R) 1 of 1 Database
6 F.C.C.R. 3996 FCOM-FCC
1991 WL 640551 (F.C.C.), 6 FCC Rcd. 3996

Federal Communications Commission (F.C.C.)

OPP Working Paper No. 26

BROADCAST TELEVISION IN A MULTICHANNEL MARKETPLACE
DA 91-817

Released: June 27, 1991

Florence Setzer [FNa1]

Jonathan Levy [FNa1]

EXECUTIVE SUMMARY

This study examines changes in the competitive situation of the television broadcasting industry from 1975 to 1990 and presents some predictions for the next decade. [FN1] Over the past fifteen years the range of broadcast, cable, and other video options available to the American viewer has increased dramatically. Broadcast television, however, has suffered an irreversible long-term decline in audience and revenue share, which will continue throughout the current decade.

In the next ten years, broadcasters will face intensified competition as alternative media, financed not only by advertising but also by subscription revenues, and offering multiple channels of programming, expand their reach and their audience. Television broadcasting will be a smaller and far less profitable business in the year 2000 than it is now. Although broadcasting will remain an important component of the video mix, small-market stations, weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some are likely to go dark. The analysis supports the conclusion that in the new reality of increased competition regulations imposed in a far less competitive environment to curb perceived market power or concentration of control over programming are no longer justified and may impede the provision of broadcast services.

THE 1975-1990 PERIOD

In 1975, the United States had three commercial broadcast television networks and no cable networks; cable television was solely a broadcast retransmission medium. Only 17 percent of television households subscribed to cable in 1976; over 56 percent subscribed in 1990. By 1990, there were four commercial broadcast networks and over 100 national and regional cable networks. The number of broadcast stations had increased by 50 percent, with independent stations accounting for three-quarters of the growth. The number of off-air stations available to the median household increased from six in 1975 to ten in 1990, and by 1990 94 percent of television households were located in markets with five or more television stations. In 1975, there were no home satellite dish systems and no home videocassette recorders (VCRs); in 1990, 3 percent of television households had home dishes and 69 percent owned VCRs.

6 F.C.C.R. 3996

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Industry observers believe that the growth of cable made possible the expansion in the number of broadcast television stations by increasing the potential audiences of UHF stations. [FN13] Cable carriage of over-the-air signals reduces the disadvantage of UHF relative to VHF stations by increasing UHF stations' geographic reach and improving their reception quality. Channel positioning also appears important to the success of broadcast stations, and cable systems can give UHF stations desirable low channel positions. Satellite delivery of syndicated programming may also have encouraged the growth in numbers of television stations by making program distribution more flexible and efficient and less expensive.

The increase in the number of over-the-air stations is reflected in an increase in the number of stations available to viewers (table 4). [FN14] In

TABLE 4

HOUSEHOLDS IN ADI'S WITH VARIOUS NUMBERS OF OVER-THE-AIR SIGNALS

	1975		1980-81		1984-85		1989-90	
	%	Cum. %	%	Cum. %	%	Cum. %	%	Cum. %
20+	0.0	0.0	0.0	0.0	0.0	0.0	10.1	10.1
15-19	14.3	14.3	13.8	13.8	20.5	20.5	17.2	27.3
10-14	6.8	21.1	12.8	26.6	15.2	35.7	26.5	53.8
5-9	57.7	78.8	56.8	83.4	51.9	87.6	40.1	93.9
1-4	21.1	99.9	16.5	99.9	12.4	100.0	6.1	100.0

FNSOURCE: Arbitron Ratings Company, Television Market and Rankings Guide, 1975, 1980-81; 1984-1985 ADI Market Guide; Television ADI Market Guide 1989-1990.

FNNOTE: Percentages do not add to 100 due to rounding.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

1975, 79 percent of television households were located in markets with 5 or more stations, not counting cable channels; by 1990 94 percent of television households were in markets with 5 or more stations (typically the three major networks, a PBS station, and an independent). In 1975 14 percent of television households had available 15 or more over-the-air stations; in 1990 27 percent had 15 or more stations and 10 percent had 20 stations. Not only has the number of television signals available increased dramatically over the past 15 years, but over-the-air service is such that most households have considerable choice in programming even without cable. Ironically, however, this expansion of over-the-air signals was made possible by cable.

TELEVISION VIEWING

Time spent watching television has increased by almost an hour per day per household since 1975. Total household viewing reached a peak in 1985, however, and has declined slightly since. [FN15]

FCC000000440

Exhibit F

EXHIBIT F

Federal Communications Commission, Report and Order, *In re Amendment of Parts 73 and 76 of the Commission's Rules*, FCC GEN. Docket No. 87-24, 3 FCC Rcd. 5299 (rel. July 15, 1988), available on Westlaw (1998 WL 486817) and Lexis (1988 FCC LEXIS 1329).

Citation | Found Document | Rank(R) 1 of 1 | Database FCOM-FCC
3 F.C.C.R. 5299
1988 WL 486817 (F.C.C.), 64 Rad. Reg. 2d (P & F) 1818, 3 FCC Rcd. 5299

DA 88-180

In the Matter of
Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries

GEN. Docket No. 87-24

Report and Order

Adopted: May 18, 1988; Released: July 15, 1988
By the Commission: Commissioner Dennis concurring and issuing a statement at a later date.

Table of Contents

Paragraphs

FCC000000442

I. Introduction

1. In this Report and Order, the Commission adopts changes to its rules regarding program exclusivity to remove anticompetitive restrictions on the ability of broadcasters to serve their viewers. Today's video marketplace calls for an impartial regulatory referee and a common set of fairly-enforced ground rules. This will provide proper market incentives for video outlets to deliver the programming that will maximize consumer benefits rather than foster the economically wasteful duplication of programming that is all too likely under our current rules.
2. This proceeding is a direct outgrowth of concerns we expressed in our 1986

Exhibit F

households in the United States, including many in metropolitan areas, [FN58] are already cable subscribers, and the number continues to rise rapidly.

26. Over the past eight years, the number of cable systems has nearly doubled, from 4079 systems serving about eight thousand communities at the end of 1979 to more than 7,800 systems serving about 21,600 communities in mid-1987. [FN59] Most of the systems in existence in 1979 had 12 channels, but by 1987, 91 percent of all cable subscribers had access to 20 or more channels; systems serving 77 percent of all subscribers had 30 or more channels. [FN60] In 1979 there were 76.3 million television households in the United States (98.7 percent of all households); 27 million of these households had access to cable, and of these, 14.8 million actually subscribed to cable (19.4 percent of all TV households and 54.8 percent of all homes passed by cable). [FN61] By the end of 1987, more than 81 percent of the approximately 89 million television households in the United States had access to cable, and nearly 45 million of these were cable subscribers (50.5 percent of all television households and 62 percent of households with access to cable). [FN62] Moreover, much of the growth in the number of cable systems and cable subscribers between 1979 and 1987 took place in major urban markets not yet wired for cable in 1979.

27. A significant reason for the increase in cable subscribers and penetration has been the growth of programming options available to cable subscribers. In 1979, satellite network distribution of cable programming was relatively new. Indeed, two of the most popular cable networks--Cable News Network (CNN), and USA Cable Network--did not begin service until Spring 1980; and a third, MTV, did not begin until summer 1981. [FN63] Of the top 20 satellite cable services (including superstations) in 1987, only six had begun operating by the end of 1979. [FN64] At the end of 1979, 24 video program services--many of them part-time--were distributed by satellite to cable systems; [FN65] by the end of 1987, this number had risen to more than 85 cable programming services. [FN66] Except for the pay cable channels like HBO, most of these cable networks are financed by both national and, increasingly, local advertising and small monthly per-subscriber fees paid to programmers by cable operators. The vast range of cable programming today in comparison with eight years ago reflects new industry alliances and program release patterns. [FN67] Even more importantly, it reflects the fact that cable, throughout this period, has been successful in obtaining significant programming on an exclusive basis. [FN68]

28. Growth in cable programming choices has been accompanied by growth in cable audiences, which in 1979 were too small to be measured by the national television ratings services. [FN69] Although the three-network primetime audience share was beginning to slip even then, it nevertheless stood at 92 percent in November 1979; [FN70] by November 1987, however, it had fallen to 75 percent. [FN71] Cable competition has caused much of this loss; indeed, the drop has been even greater in cable households and in other dayparts. In April 1987, for example, network affiliates had only 52 percent of the weekly viewing audience in cable households, while advertising-supported cable networks (including superstations) had a 27 percent share, pay cable services had an 11 percent share, local independents had a 13 percent share, and public television stations had a 3 percent share. [FN72]

29. This audience increase has been reflected in a growth in cable revenues which has been explosive. In 1979, when the Commission was considering changes in its syndicated exclusivity rules, cable operating revenues were $1.8 billion, of which $334 million came from pay programming and less than $5 million came

Exhibit G

FCC000000444

EXHIBIT G

Charles W. Ergen, Testimony Before the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate (January 27, 1999), available on Westlaw (1999 WL 32965).

Citation 1999 WL 32965 (F.D.C.H.) Found Document Rank(R) 1 of 1 Database USTESTIMONY

Testimony
January 27, 1999

Senate
Judiciary
Antitrust, Business Rights and Competition

Cable Competition

TESTIMONY OF CHARLES W. ERGEN
BEFORE THE ANTITRUST AND BUSINESS RIGHTS SUB COMMITTEE
OF THE SENATE COMMITTEE ON THE JUDICIARY
JANUARY 27, 1999

Mr. Chairman and distinguished members of this Committee, thank you for providing me the opportunity to testify before you today on competition in the subscription video marketplace and the effect we hope our company's pending acquisition of the MCI/News Corp. assets will have on competition in that market. We would also like to take the opportunity to talk briefly about S. 247, co-sponsored by some of the members of this Committee and introduced last week by Senator Hatch. Passage of that legislation, combined with Commerce Committee legislation, is critical to the success of DBS as a competitor to cable.

My name is Charlie Ergen and I am the founder and Chief Executive Officer of EchoStar Communications Corporation, a Direct Broadcast Satellite ("DBS") company based in Littleton, Colorado. I started EchoStar in 1980 as a manufacturer and distributor of C-Band satellite dishes and grew the company, by the mid-1980's into the largest supplier of C-Band dishes worldwide. I realized, however, that my vision of a dish in every home, school and business in the United States, and true, effective competition to cable, could not be realized with large dishes. Consequently, in 1987, EchoStar filed an application for a DBS permit with the Federal Communications Commission (the "FCC"). EchoStar has launched four DBS satellites since December 1995 and has invested approximately $2 billion into this technology, working to give consumers a choice to cable.

EchoStar was the first company to drop the price of a dish to below $200 when the competition was charging $800 for its product. EchoStar was the first to allow subscribers to pay a low monthly fee as they do with cable. EchoStar was the first to allow consumers to choose the 10 channels they watch the most, then pay for those "a la carte" without having to "buy through" programming they did not want, to get programming they did want.

FCC000000446

Exhibit G

FCC000000447

Exhibit H

EXHIBIT H

Charles W. Ergen, Testimony Before the Commerce Committee, U.S. Senate (July 28, 1998), available on Westlaw (1998 WL 526888).

Citation
1998 WL 526888 (F.D.C.H.)

Found Document Rank(R) 1 of 1

Database
USTESTIMONY

Federal Document Clearing House

Testimony
July 28, 1998

Senate
Commerce

Public Broadcasting, Transportation Nominations

TESTIMONY OF CHARLES W. ERGEN CEO, ECHOSTAR COMMUNICATIONS CORPORATION BEFORE THE SENATE COMMERCE COMMITTEE ON THE SUBJECT OF COMPETITION TO CABLE

JULY 28,1998

Mr. Chairman and distinguished members of this Committee, thank you for providing me the opportunity to testify before you today about competition to cable. I believe DBS can be an effective competitor to cable. The technology is now here today but unfortunately some regulatory hurdles and continuing abuses of market power by cable operators are standing in the way. We urge Congress to act swiftly, remove the remaining hurdles and prevent abuse of cable power so effective competition can emerge and, at last, lower consumer bills.

My name is Charlie Ergen, and I am the founder and Chief Executive Officer of EchoStar Communications Corporation, a Direct Broadcast Satellite ("DBS") company based in Littleton, Colorado. I started EchoStar in 1980 as a manufacturer and distributor of C-band satellite dishes and grew the company by the mid-1980's into the largest supplier of C-band dishes in the world. I realized, however, that my vision of a dish in every home, school and business in the United States, and true, effective competition to cable, could not be realized with large dishes. Consequently, in 1987 EchoStar filed an application for a DBS permit with the Federal Communications Commission (the "FCC"). EchoStar has launched four DBS satellites since December 1995 and has invested approximately $2 billion in DBS, working to give consumers a choice to cable.

CURRENTLY THERE IS NO EFFECTIVE COMPETITION TO CABLE

In its Fourth Annual Report to Congress, the Federal Communications Commission reconfirmed that, despite the efforts of competitors such as DBS, cable operators continue to possess bottleneck monopoly power in the distribution of multichannel video programming.[1] Among the Commission's findings were the following:

FCC000000449

Exhibit H

EXHIBIT I

Charles W. Ergen, Testimony Before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives (April 1, 1998), available on Westlaw (1998 WL 798847).

Citation 1998 WL 798847 (F.D.C.H.) Found Document Rank(R) 1 of 1 Database USTESTIMONY

Testimony
April 01, 1998

House of Representatives
Commerce
Telecommunications, Trade and Consumer Protection

Video Competition Multichannel Programming

TESTIMONY OF
CHARLES W. ERGEN
CEO, ECHOSTAR COMMUNICATIONS CORPORATION

April 1, 1998

Mr. Chairman and distinguished members of this Committee, thank you for inviting me here today to testify before you about the impact that the pending legislation to reform the Satellite Home Viewer Act would have on competition in the multi-channel video delivery market.

My name is Charlie Ergen, and I am the founder and Chief Executive Officer of EchoStar Communications Corporation, a Direct Broadcast Satellite ("DBS") company based in Colorado. I started EchoStar in 1980 as a manufacturer and distributor of C-band satellite dishes and grew the company by the mid -1980s into the largest supplier of C-band dishes in the world. I realized, however, that my vision of a dish in every home, school and business in the United States, and true effective competition to cable, could not be realized with large dishes. Consequently, in 1987 EchoStar filed an application for a DBS permit with the Federal Communications Commission (the "FCC"). EchoStar launched its first DBS satellite in December 1995, its second DBS satellite in September 1996, and its third satellite this past October. We have a fourth satellite launch planned for the first half of this year. By the middle of the year, we will have invested approximately $2 billion in DBS, working to give consumers a choice to cable.

On behalf of EchoStar's 1.2 million subscribers nationwide, I would like to thank you and the 146 co-sponsors of H.R. 2921, the "Multi channel Video Competition and Consumer Protection Act of 1997", for the effort you are waging on behalf of the American people to keep their satellite subscription fees affordable. The legislation you and your colleagues are considering here in the House, and the legislation Senator John McCain has introduced in the Senate, are crucial to the public we both serve. As you know, FCC000000452

EXHIBIT J

Charles W. Ergen, Testimony Before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives (February 4, 1998), available on Westlaw (1998 WL 61501).

Citation   Found Document   Rank(R) 1 of 1   Database
1998 WL 61501 (F.D.C.H.)   USTESTIMONY

Testimony
February 04, 1998

House of Representatives
Judiciary
Courts and Intellectual Property

Broadcast Retransmission Fees: Satellite v. Cable

Testimony of Echostar Communications Corporation
before the Subcommittee on Courts and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
February 4, 1998

Mr. Chairman and distinguished members of this Subcommittee, thank you for providing me the to testify before you today. This hearing is particularly timely and important given the mountain of recent evidence that the reforms you are considering are crucial to assuring protection and a fair return to copyright owners, while creating more effective competition to cable. During 1997, cable rates rose 400% faster than the rate of inflation, continuing a troubling pattern that has proven difficult to control. The disparate treatment of cable and satellite retransmission under the existing copyright laws is a significant factor hampering effective competition to cable monopolies from satellite distributors like my company. Only with your help can crucial programming, including superstations and local network channels, be delivered to consumers at competitive rates. Only with your help can the otherwise inevitable road towards significantly increased regulation and oversight of the cable industry be avoided. These efforts are equally important to Protect copyright owners from the continuing pressure cable interests assert to obtain ownership interests in programmers, and to drive below market pricing for content.

My name is Charlie Ergen. I am the founder and Chief Executive Officer of EchoStar Communications Corporation, a Direct Broadcast Satellite ("DBS") company based in Colorado. I started EchoStar in 1980 as a manufacturer and distributor of C-band satellite dishes and grew the company, by the mid -1980's, into the largest supplier of C-band dishes in the world. I realized, however, that my vision of a dish in every home ' school and business in the United States, and true effective competition to cable, could not be realized with large dishes.

Consequently, during 1987 EchoStar filed with the Federal

Exhibit K

EXHIBIT K

Charles W. Ergen, Testimony Before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives (October 30, 1997), available on Westlaw (1997 WL 683674).

Citation | Found Document | Rank(R) 1 of 1 | Database
1997 WL 683674 (F.D.C.H.) | | | USTESTIMONY

Testimony
October 30, 1997

House of Representatives
Commerce
Telecommunications, Trade and Consumer Protection

Video Competition

Testimony of

Charles W. Ergen

Chief Executive Officer

ECHOSTAR COMMUNICATIONS

on

VIDEO COMPETITION: ACCESS TO PROGRAMMING

before

SUBCOMMITTEE on TELECOMMUNICATIONS,
TRADE & CONSUMER PROTECTION

COMMITTEE ON COMMERCE
U.S. HOUSE of REPRESENTATIVES

OCTOBER 30, 1997

SUMMARY OF STATEMENT OF CHARLES W. ERGEN
CEO, ECHOSTAR COMMUNICATIONS CORPORATION
BEFORE THE SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE AND CONSUMER PROTECTION
U.S. HOUSE COMMITTEE ON COMMERCE
OCTOBER 30, 1997

EchoStar Communications Corporation appreciates Congress' efforts over the past five years to create competition in the multichannel video programming distribution ("MVPD") marketplace. EchoStar is a Direct Broadcast Satellite (DBS) company which began service in March of 1996 and has over 800,000 subscribers. The company has lead the way to bringing down the price of the DBS dish to under $200 and has sought to offer a true alternative to cable through aggressive pricing of both the hardware and the programming. Despite the inroads EchoStar has made in offering

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the Company by the mid 1980s into the largest supplier of C-band dishes in the world. I realized, however, that my vision of a dish in every home, school and business in the United States, and true effective competition to cable, could not be realized with large dishes.

Consequently, during 1987, EchoStar filed with the Federal Communications Commission (the "FCC") for a DBS license. EchoStar launched its first DBS satellite during December 1995, its second DBS satellite during September 1996, and its third satellite earlier this month. We have a fourth satellite launch planned for the first quarter of next year. By the middle of next year, we will have invested approximately $2 billion in DBS, working to create true effective competition to cable.

EchoStar's Dish Network currently serves over 800,000 subscribers, most of whom chose the DISH Network over their existing cable provider. Our subscriber count continues to grow each month. The DISH Network offers consumers over 150 channels of digital, CD quality video and audio programming, together with an on screen "TV Guide" type feature that makes it simple to get information and choose the television program you want to watch with the touch of a button from your remote control. We intend to offer significant educational programming, data to the home, free access to political candidates, and other public service options in the near future. We even have a "V chip" included with every receiver, which allows parents to screen out movies and other programming not only according to their MPAA rating, but also according to whether the program includes sexual content, violence, nudity or objectionable language.

Our marketing strategy has been to provide cable subscribers with a true alternative through aggressive pricing. We have been the leader in reducing the cost of DBS hardware to the consumer. The typical DBS system now sells for less than $200. All systems include the trademark 18 inch dish that has started to be seen with more frequency in cable franchise areas. EchoStar now offers second TV set top boxes at prices as low as $129. The hardware can be purchased, financed or leased. Consequently, we believe that the price of hardware is no longer a major impediment to consumers switching from cable to satellite.

EchoStar offers 40 of the most popular cable channels for $19.99 per month, significantly less than typical cable. Additionally, EchoStar refuses to adhere to the cable "tiering" model perpetuated in the carriage agreements offered by cable affiliated programmers, which forces the consumer to subscribe and pay for programming they do not want. Instead, while EchoStar tiers its programming options to comply with requirements in programming agreements, EchoStar also offers the consumer the opportunity to create their own packages, choosing only the

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Exhibit L

EXHIBIT L

Comments of EchoStar Satellite Corporation, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* FCC CS Docket No. 99-230 (August 6, 1999), available on the FCC web site <https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6009148730>.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 99-230

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its Comments in response to the above-captioned Notice of Inquiry released by the Commission on June 23, 1999. *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230 (rel. June 23, 1999). The Notice requests comments on the status of competition in the markets for delivery of video programming. EchoStar is a multichannel video programming distributor ("MVPD") providing Direct Broadcast Satellite ("DBS") service to subscribers throughout the United States. It currently operates four DBS satellites and soon plans to launch additional satellites. As of July 1999, EchoStar had over 2.6 million subscribers.

Effective competition has yet to arrive in the MVPD markets. Even though the increases in DBS subscribers have confirmed that DBS services are perhaps the only viable alternative to cable at this time, cable operators still dominate most MVPD markets. To EchoStar's knowledge, the increases in subscriber counts of the two DBS distributors have not been accompanied by corresponding decreases in the number of cable subscribers or by substantial erosion of cable market shares. In particular, cable operators preserve their stranglehold in urban areas. This continued dominance is largely due to unfair or unlawful

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Exhibit M

EXHIBIT M

Comments of EchoStar Communications Corporation, *In re Amendment of Parts 2 and 25 of the Commission's Rules,* FCC ET Docket No. 98-206 (March 2, 1999), available on the FCC web site
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006443772>.